

PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No.: 10/667,225 Confirmation No.: 7016
Applicant(s): Joseph J. Estwanik
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Art Unit: 3764
Examiner: Lori Baker Amerson
Title: LOWER EXTREMITY STRETCHING DEVICE

Docket No.: 051586/310309
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Commissioner for Patents
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APPEAL BRIEF UNDER 37 CFR § 41.37

This Appeal Brief is filed pursuant to the "Notice of Appeal to the Board of Patent Appeals and Interferences" filed October 9, 2006.

1. ***Real Party in Interest.***

The real party in interest in this appeal is Joseph J. Estwanik.

2. ***Related Appeals and Interferences.***

There are no related appeals and/or interferences involving this application or its subject matter.

3. ***Status of Claims.***

The present appeal involves Claims 1-19. Claims 12-15 and 19 have been allowed, while Claims 1-11 and 16-18 are presently under a final rejection, as set forth by the Official Action mailed July 10, 2006. The claims at issue are set forth in the attached Claims Appendix.

4. ***Status of Amendments.***

No amendments have been made subsequent to the final Official Action of July 10, 2006.

5. ***Summary of Claimed Subject Matter.***

Embodiments of the present invention provide apparatus and methods for stretching a user's leg muscles. In particular, independent Claims 1, 7, 12, and 14 recite a rocker device **20** having a pair of lower rocking surfaces **30** that are arcuately shaped with a constant radius for rocking motion on a generally flat surface (FIGS. 1 and 4; ¶¶ 8, 11, and 24). Independent Claims 1, 7, 12, and 14 also recite that the rocker device **20** includes an upper platform surface **40** extending between opposing ends of a respective rocking surface **30** (FIGS. 1, 2, and 4; ¶¶ 8, 11, and 25). Moreover, independent Claims 1, 7, 12, and 14 recite that a recess **50** is defined between the rocking surfaces **30** by substantially only two angularly converging platform surfaces **60** fixedly attached between the lower rocking surfaces and the respective upper platform surfaces **40** (FIGS. 1 and 2; ¶¶ 8, 11, and 25).

As also recited in Claims 1 and 12, the recess **50** is defined to receive a user's knee in a bent condition of the user's leg for stretching the user's quadriceps upon rocking motion (FIG. 3; ¶¶ 8, 9, 11-13, 25, 29, and 31). The method of independent Claim 12 further recites the steps of resting the rocking surface **30** on a generally flat surface, placing a user's knee in bent condition in the recess **50** of the upper platform surface **40**, and rocking the apparatus backwards and forwards using the user's knee in the recess **50** to guide the rocking motion of the rocker device **20** (FIG. 3; ¶¶ 9, 13, 29, and 31).

Independent Claims 7 and 14 recite that the rocker device **20** is alternatively positionable between first and second positions (FIGS. 1, 3, 4, 5A, and 5B; ¶¶ 10-13 and 26-28). In this regard, Claim 7 recites that the first position corresponds to a position where the lower rocking surface **30** rests on a generally flat surface allowing the user to position the user's knee in a bent condition of the user's leg in the recess **50** of the upper platform surface **40** for stretching the user's quadriceps upon rocking motion (FIG. 3; ¶¶ 11, 12, and 25). Independent Claim 7 recites that the second position corresponds to a position where the upper platform surface **40** rests on a generally flat surface allowing a user to position alternatively the user's heel of the user's leg on

at least a portion of at least one of the angularly converging platform surfaces **60** for stretching the user's hamstring muscle or to position the user's foot of the user's leg on at least a portion of one of the angularly converging platform surfaces **60** for stretching the user's calf muscle (FIGS. 4, 5A, and 5B; ¶¶ 11, 12, 25, and 26).

The method of Claim 14 similarly recites stretching the user's quadriceps muscle in the first position by placing a user's knee in a bent condition in the recess **50** of the upper platform surface **40** and rocking the device **20** backwards and forwards using the user's knee in the recess **50** to guide the rocking motion of the device **20** for stretching the quadriceps muscles (FIG. 3; ¶¶ 9, 10, 13, and 29-31). Furthermore, independent Claim 14 recites stretching the hamstring muscles in the second position by placing a heel of one of the user's outstretched legs on at least a portion of at least one of the angularly converging platform surfaces **60** and leaning forward towards the device **20** for stretching the hamstring muscles (FIG. 5A; ¶¶ 10, 13, 30, and 31). In addition, Claim 14 recites stretching the calf muscles in the second position by placing one foot of the user's leg on at least a portion of one of the angularly converging platform surfaces **60** while maintaining contact with the generally flat surface with the heel of the user's foot for stretching the calf muscles (FIG. 5B; ¶¶ 10, 13, 30, and 31).

Dependent Claims 4 and 10 recite that at least one of the angularly converging platform surfaces **60** have at least one indentation **55** for receiving the user's shin bone when the user's knee is received in the recess **50** in a bent condition (FIGS. 1 and 2; ¶¶ 11 and 24). Similarly, dependent Claim 17 recites that the at least one indentation **55** is defined in, and extends substantially along, a respective angularly converging platform surface **60** (FIG. 2; ¶¶ 11 and 24). Additionally, dependent Claim 6 recites that a substantial portion of each upper platform surface **60** is configured to rest on a generally planar surface (FIGS. 4, 5A, and 5B; ¶¶ 11, 12, and 25). Similarly, dependent Claim 18 recites that each upper platform surface **60** is substantially planar (FIGS. 1-5; ¶¶ 11, 12, and 25).

6. ***Grounds of Rejection to be Reviewed on Appeal.***

Claims 1-11 and 16-18 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 4,241,949 to Parker in view of U.S. Patent No. 1,441,940 to Nafe, U.S. Patent No. 3,526,429 to Metzger, and U.S. Patent No. D320,701 to Hoff.

7. ***Argument.***

Rejection of Claims 1-11 and 16-18 under 35 U.S.C. § 103(a) as being unpatentable over Parker, Nafe, Metzger, and Hoff

(a) Independent Claims 1 and 7

Applicant initially submits that the prior art relied upon in rejecting Claims 1-13 and 16-18 is non-analogous art for purposes of an obviousness rejection under 35 U.S.C. § 103(a). “Any analogous or pertinent prior art plays a role in the determination of the patentability of the claims at the time of invention.” *Beckson Marine, Inc. v. NFM, Inc.*, 292 F.3d 718, 726 (Fed. Cir. 2002). A prior art reference is analogous if the reference is in the field of applicant’s endeavor or, if not, the reference is reasonably pertinent to the particular problem with which the inventor was concerned. *In re Oetiker*, 977 F.2d 1443, 1446 (Fed. Cir. 1992).

In this vein, Parker relates to a rockable piece of furniture, Metzger relates to a rocking chair, Nafe relates to a rocking amusement device, and Hoff relates to a rocking chair. As such, Applicant respectfully submits that the cited art, which generally relates to rocking chairs or rocking amusement devices, is clearly non-analogous art. Rocking chairs and amusement devices are not “reasonably pertinent” to solving the problem of properly stretching a user’s leg muscles and are inapplicable to injury prevention and treatment of said muscles. In particular, rocking chairs are configured to accommodate a subject in a seated position, while the claimed invention relates to accommodating a portion of a subject’s leg in a manner that properly stretches the quadriceps, or that may be alternatively used to stretch the user’s hamstring or calf muscles. The anatomical differences required to stretch a user’s leg muscles versus simply accommodating a seated subject are clearly unrelated and, therefore, the problems to be solved are also unrelated. As such, Applicant submits that the cited references are not “reasonably pertinent” to the problem to be solved and are, thus, non-analogous art.

Not only are the references from different fields and unrelated to lower extremity injury rehabilitation and stretching, but the requisite motivation or suggestion to combine Parker with either Metzger, Nafe, or Hoff is also otherwise lacking. In order to properly combine references, a teaching or motivation to combine the references is essential. *In re Fine*, 337 F.2d 1071, 1075 (Fed. Cir. 1988). In fact, the Court of Appeals for the Federal Circuit has stated that, “[c]ombining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor’s disclosure as a blueprint for piecing together the prior art to defeat patentability -- the essence of hindsight.” *In re Dembiczak*, 175 F.3d 994 (Fed. Cir. 1999). Although the evidence of a suggestion, teaching, or motivation to combine the references commonly comes from the prior art references themselves, the suggestion, teaching, or motivation can come from the knowledge of one of ordinary skill in the art or the nature of the problem to be solved. *Id.* In any event, the showing must be clear and particular and “[b]road conclusory statements regarding the teaching effect of multiple references, standing alone, are not ‘evidence’.” *Id.*

The Examiner finds that it would have been obvious to modify Parker to include rocking surfaces having constant radii based on a combination of Metzger and Nafe. Parker discloses curved bottom supports that include at least three different radii, while “[a]ll the other patent designs incorporate a half-circle, using a single radius for the bottom curve” (col. 1, lines 42-43). In addition, Parker discloses that the front curve provides a “fast sweeping backward motion,” the middle section “slows the chair down,” while the rear elongated curve “gives the full, but secure, 125° rock to the ears or stops” (col. 1, lines 46-50). Furthermore, Parker discloses that:

The bottom curve of each side piece 1,2 on which the device rocks is critical to satisfactory operation, same being a combination of curves or an irregular curve 12 and blended into the reverse curve 13 of the ears 9 and 10 which prevent the device from overturning when said ears contact the floor at the backward limit of rock (about 125°). Col. 2, lines 31-37.

In contrast, both Metzger and Nafe disclose semi-circular rocking surfaces. Therefore, Parker teaches away from “all the other patent designs” having a rocking surface with a constant radius, as recited by the claimed invention. In addition, Parker discloses a rocking surface that limits rocking motion to about 125°, while Metzger is configured to allow a range of about 90°

of rocking motion and Nafe is configured to allow rocking motion over a range of about 180°. As such, Parker teaches away from any purported combination with either Metzger or Nafe and such combination would also render Parker unsuitable for its purported “unique 125° rock.”

Similarly, there is no motivation or suggestion to combine Parker with Hoff, as Parker also teaches away from such a combination. The Examiner believes that it would have been obvious to modify Parker to include angularly converging platform surfaces in light of the disclosure of Hoff. However, Parker discloses that “[a]n important factor of the seat is the positioning of the back rest and its height from the floor” (col. 2, lines 26-27). In particular, Parker discloses that “[t]he placement and shape of the body support piece, together with the depth of the cushion is imperative in achieving a 125° rock” (col. 1, lines 35-39) (emphasis added). The back section of Parker is long and extends between a seat and a head rest (col. 1, lines 30-32). Conversely, Hoff simply discloses a seat and backrest that are generally perpendicular to one another, which is clearly distinguishable from the configuration of the body support piece of Parker. Thus, Parker teaches away from any combination with Hoff, as the head support, back rest, and seat are “imperative” features.

Furthermore, the Examiner dismisses several recitations of independent Claims 1 and 7 as allegedly lacking patentable weight because the recitations are purely functional in nature and do not recite any structure. For instance, independent Claim 1 recites that the recess defined for receiving a user’s knee in bent condition for stretching the user’s quadriceps upon rocking motion. Applicants respectfully disagree that these functional recitations should not be considered for patentability, as described below. Accordingly, Applicants submit that even if the cited references were combined as proffered by the Examiner, such combination does not teach or suggest independent Claims 1 and 7 of the present application.

As a general proposition, the MPEP provides a section, § 2173.05(g), specifically directed to functional limitations which states:

A functional limitation is an attempt to define something by what it does, rather than by what it is (e.g., as evidenced by its specific structure or specific ingredient). There is nothing inherently wrong about defining some part of an invention in functional terms. Functional language does not, in and of itself, render a claim improper. *In re Swinehart*, 439 F.2d 210, 169 U.S.P.Q. 226

(CCPA 1971). A functional limitation must be evaluated and considered, just like any other limitation of the claim, for what it fairly conveys to a person of ordinary skill in the pertinent art in the context in which it is used. A functional limitation is often used in association with an element, ingredient, or step of a process to define a particular capability of purpose that is served by the recited element, ingredient, or step.

In addition to this general proposition that functional limitations should be considered for purposes of patentability, the Board of Patent Appeals and Interferences in a recent, non-precedential decision styled *Ex parte Bamber* has considered instances, such as in the present application, in which an apparatus claim includes functional recitations. See Appeal No. 2005-2435 relating to Application No. 10/407,498. In *Ex parte Bamber*, the Board stated:

It is well established, of course, that the patentability of an apparatus claim is based on the apparatus rather than the manner in which it is used. For example, see *In re Case*, 370 F.2d 576, 579-80, 152 USPQ 235, 238 (CCPA 1967). Nevertheless, to anticipate an apparatus claim, the prior art apparatus must not only possess the claimed structure but also must possess at least the capability of performing the functions required by the apparatus claim, and it is the examiner's burden to establish the reasonableness of believing that such functional limitations are an inherent characteristic of the prior art apparatus. See *Ex parte Levy*, 17 USPQ2d 1461, 1463-64 (Bd. Pat. App. & Int. 1990) and *Ex parte Skinner*, 2 USPQ2d 1788, 1789 (Bd. Pat. App. & Int. 1986). (emphasis added).

Although *Ex parte Bamber* is non-precedential, the *Ex parte Bamber* decision tracked the guidance of MPEP § 2112, part IV which provides that it is the Examiner's burden to provide rationale or evidence demonstrating the inherency of a result or characteristic alleged to be present in the prior art, whether under an anticipation or obviousness rejection. Therefore, Applicants submit that the Examiner has incorrectly ignored the functional language of independent Claims 1 and 7 for purposes of patentability, namely an apparatus for stretching a user's leg muscles. In particular, none of the cited references discloses a rocker device including a recess defined between a pair of rocking surfaces for receiving a user's knee in a bent condition of the user's leg for stretching the user's quadriceps upon rocking motion, as recited by Claim 1. Moreover, none of the cited references teach or suggest allowing the user to position the user's knee in a bent condition of the user's leg in the recess of the upper platform surface for stretching the user's quadriceps upon rocking motion and allowing a user to position alternatively the user's

heel of the user's leg on at least a portion of at least one of the angularly converging platform surfaces for stretching the user's hamstring muscle or to position the user's foot of the user's leg on at least a portion of one of the angularly converging platform surfaces for stretching the user's calf muscle, as recited by independent Claim 7. Therefore, Applicants submit that the Examiner has failed to demonstrate that stretching a user's leg muscles as defined by the claimed invention is an inherent characteristic of the rockable furniture and amusement devices of the cited references; there is simply no basis or technical reasoning to suggest otherwise. As such, even if the cited references were combined, the combination fails to teach or suggest each of the recitations of independent Claims 1 and 7.

Therefore, Applicant submits that the rejection of independent Claims 1 and 7 under 35 U.S.C. § 103(a) is overcome. Because each of the dependent claims includes the limitations of a respective independent claim, the dependent claims are allowable for at least those reasons discussed above.

(b) Dependent Claims 4, 10, and 17

Moreover, Applicant submits that although the dependent claims are distinguishable for at least those reasons discussed with respect to a respective independent claim, several of the dependent claims are further distinguishable from the cited references. For example, none of the cited references discloses at least one angularly converging platform surface having at least one indentation for receiving the user's shin bone when the user's knee is received in the recess in a bent condition, as recited by dependent Claims 4 and 10. Similarly, none of the cited references discloses at least one indentation that is defined in, and extends substantially along, a respective angularly converging platform surface, as recited by new dependent Claim 17. For example, see item #55 shown in Figure 2 of the present application. Conversely, none of the cited references discloses an indentation for receiving a shin bone, let alone an indentation extending substantially along a converging platform surface, as recited by the claimed invention.

(c) Dependent Claims 6 and 18

Additionally, none of the cited references teaches or suggests that a substantial portion of each upper platform surface is configured to rest on a generally planar surface, as recited by dependent Claim 6. Similarly, none of the cited references, taken alone or in combination, teaches or suggests that each upper platform surface is substantially planar, as recited by dependent Claim 18. In this regard, each of Parker, Metzger, Nafe, and Hoff discloses curving or non-planar edges extending between respective rocking surfaces. For instance, see the top curve (14) in FIG. 4 of Parker, the arcing longitudinal edges of side frames (10, 12, 14) in FIG. 2 of Metzger, and the non-planar edges in FIG. 2 of Hoff. Although Nafe discloses that the rockers include flat supporting heads (1^b), a substantial portion of the sides of the rockers include V-shaped recesses (1^c) as shown in FIG. 3 of Nafe. In contrast, Claim 18 recites that each upper platform surfaces extending between respective rocking surfaces is substantially planar, while Claim 6 recites that a substantial portion of each upper platform surface is configured to rest on a generally planar surface.

As dependent Claims 4, 6, 10, 17, and 18 depend from a respective independent claim, each dependent claim is distinguishable from any combination of the cited references for the reasons described above in conjunction with the independent claims. Additionally, Applicants submit that dependent Claims 4, 6, 10, 17, and 18 are further distinguishable over the cited references, taken individually or in combination, for at least those additional reasons discussed above.

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CONCLUSION

For the above reasons, it is submitted that the rejections of Claims 21-38 are erroneous and reversal of the rejections is respectfully requested. A Claims Appendix containing a copy of claims involved in the appeal, an Evidence Appendix, and a Related Proceedings Appendix are attached.

Respectfully submitted,



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Claims Appendix.

1. (Previously Presented) An apparatus for stretching a user's leg muscles, comprising a rocker device having at least a pair of lower rocking surfaces that are arcuately shaped with a constant radius for rocking motion on a generally flat surface and an upper platform surface extending between opposing ends of a respective rocking surface, wherein a recess is defined between the rocking surfaces by substantially only two angularly converging platform surfaces fixedly attached between the lower rocking surfaces and respective upper platform surfaces for receiving a user's knee in a bent condition of the user's leg for stretching the user's quadriceps upon rocking motion.

2. (Original) An apparatus in accordance with claim 1, wherein the recess is cushioned.

3. (Original) An apparatus in accordance with claim 1, wherein the rocker device has at least one handle for transporting the rocker device.

4. (Previously Presented) An apparatus in accordance with claim 1, wherein at least one of the angularly converging platform surfaces has at least one indentation for receiving the user's shin bone when the user's knee is received in the recess in a bent condition.

5. (Previously Presented) An apparatus in accordance with claim 1, wherein the two platform surfaces are attached at an angle of approximately 90 degrees to one another for receiving a user's knee in bent condition.

6. (Previously Presented) An apparatus in accordance with claim 1, wherein a substantial portion of each upper platform surface is configured to rest on a generally planar surface allowing a user alternatively to position the user's heel of the user's leg on at least a portion of at least one of the angularly converging platform surfaces for stretching the user's

hamstring muscle or to position the user's foot of the user's leg on at least a portion of one of the angularly converging platform surfaces for stretching the user's calf muscle.

7. (Previously Presented) An apparatus for stretching a user's leg muscles, comprising a rocker device having at least a pair of lower rocking surfaces that are arcuately shaped with a constant radius for rocking motion and an upper platform surface extending between opposing ends of a respective rocking surface, wherein a recess is defined between the rocking surfaces by substantially only two angularly converging platform surfaces fixedly attached between the lower rocking surface and the upper platform surface, said rocker device being alternatively positionable between

a first position wherein the lower rocking surface rests on a generally flat surface allowing the user to position the user's knee in a bent condition of the user's leg in the recess of the upper platform surface for stretching the user's quadriceps upon rocking motion, and

a second position wherein the upper platform surface rests on a generally flat surface allowing a user to position alternatively the user's heel of the user's leg on at least a portion of at least one of the angularly converging platform surfaces for stretching the user's hamstring muscle or to position the user's foot of the user's leg on at least a portion of one of the angularly converging platform surfaces for stretching the user's calf muscle.

8. (Original) An apparatus in accordance with claim 7, wherein the recess is cushioned.

9. (Original) An apparatus in accordance with claim 7, wherein the rocker device has at least one handle for transporting the rocker device.

10. (Previously Presented) An apparatus in accordance with claim 7, wherein at least one of the angularly converging platform surfaces has at least one indentation for receiving the user's shin bone when the user's knee is received in the recess in a bent condition.

11. (Previously Presented) An apparatus in accordance with claim 7, wherein the two platform surfaces are attached at an angle of approximately 90 degrees to one another for receiving a user's knee in bent condition.

12. (Previously Presented) A method of stretching a user's leg muscles using an apparatus comprising a rocker device having at least a pair of lower rocking surfaces that are arcuately shaped with a constant radius for rocking motion on a generally flat surface and an upper platform surface extending between opposing ends of a respective rocking surface, wherein a recess is defined between the rocking surfaces by substantially only two angularly converging platform surfaces fixedly attached between the lower rocking surface and the upper platform surface for receiving a user's knee in a bent condition of the user's leg for stretching the user's quadriceps upon rocking motion, the method comprising the steps of:

- a. resting the lower rocking surface on-a generally flat surface;
- b. placing a user's knee in a bent condition in the recess of the upper platform surface; and
- c. rocking the apparatus backwards and forwards using the user's knee in the recess to guide the rocking motion of the rocker device for stretching the quadriceps muscles.

13. (Previously Presented) A method in accordance with claim 12, wherein the two platform surfaces are attached at an angle of approximately 90 degrees to one another for receiving a user's knee in bent condition.

14. (Previously Presented) A method of stretching a user's leg muscles, the method comprising the steps of:

- a. providing a device having at least a pair of lower rocking surfaces that are arcuately shaped with a constant radius for rocking motion and an upper platform surface extending between opposing ends of a respective rocking surface, wherein a recess is defined between the rocking surfaces by substantially only two angularly converging platform surfaces fixedly attached between the lower rocking surface and the upper platform surface;

b. selectively positioning the device in a first position wherein the lower rocking surface rests on a generally flat surface or a second position wherein the upper platform surface rests on a generally flat surface; and

c. selectively stretching the user's leg muscles by:

i. stretching the quadriceps muscles in said first position by:

A. placing a user's knee in a bent condition in the recess of the upper platform surface; and

B. rocking the device backwards and forwards using the user's knee in the recess to guide the rocking motion of the device for stretching the quadriceps muscles; or

ii. stretching the hamstring muscles in said second position by:

A. placing a heel of one of the user's outstretched legs on at least a portion of at least one of the angularly converging platform surfaces; and

B. leaning forward towards the device for stretching the hamstring muscles; or

iii. stretching the calf muscles in said second position by placing one foot of the user's leg on at least a portion of one of the angularly converging platform surfaces while maintaining contact with the generally flat surface with the heel of the user's foot for stretching the calf muscles.

15. (Previously Presented) A method in accordance with claim 14, wherein the two platform surfaces are disposed at an angle of approximately 90 degrees to one another for receiving a user's knee in bent condition.

16. (Previously Presented) An apparatus in accordance with claim 1, wherein the lower rocking surface is semi-circular.

17. (Previously Presented) An apparatus in accordance with claim 4, wherein at least one indentation is defined in, and extends substantially along, a respective angularly converging platform surface.

18. (Previously Presented) An apparatus in accordance with claim 1, wherein each upper platform surface is substantially planar.

19. (Previously Presented) A method in accordance with claim 12, wherein each upper platform surface is substantially planar.

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Evidence Appendix.

No additional evidence is provided.

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Related Proceedings Appendix.

There are no related proceedings.